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Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MICHIGAN,

Petitioner,

—v.—

TYRIS LEMONT HARVEY,

Respondent.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

**BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL
LIBERTIES UNION AND THE ACLU OF MICHIGAN
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI^{1/}

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan, membership organization dedicated to preserving the constitutional protections embodied in the Bill of Rights. The ACLU of Michigan is one of its statewide affiliates.

This case involves the meaning and scope of the right to counsel provided by the Sixth Amendment. Because the right to counsel is central to any constitutional vision of the appropriate relationship between the individual and state, the issues in this case are directly related to the organizational purposes of the ACLU.

^{1/} Letters of consent to the filing of this brief have been lodged with the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

The record in this case reveals a persistent effort by the police to elicit statements from the respondent in violation of his constitutional rights.

Respondent's first statement was made in the period following his arrest and before his arraignment on charges of first degree criminal sexual conduct. So far as the record reveals, he was never advised of his Miranda rights. (Pet.App.2a) His statement was nonetheless recorded by the police, who asked him to verify its accuracy by signing the bottom of each page. In response, respondent agreed to sign only the first page. Id. He refused to sign the final two pages because he did not believe they accurately reflected what he had said to the police. Id. Later that

same day, respondent was arraigned and counsel was appointed.

On September 9, 1986, six days before the commencement of trial, respondent informed the police that he wanted to make another statement. When he expressed some doubt as to whether he should make the statement in the absence of his lawyer, an officer told him that his attorney's presence was unnecessary since his statement would be recorded and a copy of the statement would be given to counsel. (Pet. App.3a)

Following this misleading exchange, respondent was asked to sign a form waiving his Miranda rights. As before, his response was a selective one. Thus, he initialed those sections of the form dealing with his right to remain silent, to have an attorney present during question-

ing, and to have counsel appointed if he could not afford one. Id. He did not initial the section of the form noting that any statement he made could be used against him, nor did he acknowledge his right to terminate questioning "at any time." (Pet.App.4a) Despite these omissions, respondent was asked if he understood his constitutional rights. He answered yes and then proceeded to give a detailed statement that was different from his first statement but, as the Michigan Court of Appeals noted, "essentially similar to his [subsequent] trial testimony." Id.

Neither statement was used by the prosecution during its case-in-chief. However, once respondent testified in his own behalf, the prosecution introduced both statements for impeachment purposes during

cross-examination. The signed page of the prearraignment statement was introduced without objection. Id. The postarraignment statement was admitted by the trial judge despite the prosecutor's concession that it had been obtained in violation of Miranda. (Pet.App.5a)

Following his conviction, respondent appealed to the Michigan Court of Appeals on the ground that neither statement should have been admitted for any purpose. The Court of Appeals agreed on one statement and disagreed on the other. Specifically, the court held that respondent's prearraignment statement had been voluntarily made under the Fifth Amendment and was therefore admissible as impeachment evi-

dence even if no Miranda warnings were given. (Pet.App.6a)^{2/}

Respondent's second statement, by contrast, was declared inadmissible under the Sixth Amendment because it had been made following arraignment and after respondent had requested the assistance of counsel. (Pet.App.6a-7a)^{3/} In addition, the court held that "[b]ecause this case involved a credibility contest between defendant and the victim, we cannot say that the error was harmless beyond a rea-

^{2/} Michigan law apparently allowed the appellate court to consider the admissibility of the first statement even though no contemporaneous objection had been made at trial.

^{3/} The court rejected respondent's Fifth Amendment objection to the use of the postarraignment statement on the theory that it had also been made voluntarily and thus was available for impeachment purposes under this Court's established precedents. Neither that issue nor the propriety of using respondent's prearraignment statement for impeachment purposes is now before this Court.

sonable doubt." (Pet.App.7a) The state's application for leave to appeal was denied by the Michigan Supreme Court. (Pet. App.8a)

SUMMARY OF ARGUMENT

The issue in this case is whether a statement taken in violation of the Sixth Amendment right to counsel can be used to impeach a defendant's credibility during trial.^{4/}

For more than half a century, this Court has held that the right to counsel attaches at arraignment. See Powell v. Alabama, 287 U.S. 45 (1932). This Court has also held that the right to counsel can not be circumvented by strategies designed

^{4/} The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

to encourage the defendant to make a post-arraignment statement in the absence of counsel. See e.g., Maine v. Moulton, 474 U.S. 159, 170-71 (1985); Massiah v. United States, 377 U.S. 201, 206 (1964). Finally, in Michigan v. Jackson, 475 U.S. 625, 636 (1986), this Court adopted the prophylactic rule that the right to counsel is not subject to waiver once invoked at "an arraignment or similar proceeding."

In urging reversal, the central contention of both petitioner and the Solicitor General is that the only rule that was violated in this case was the prophylactic rule of Michigan v. Jackson. Proceeding from this premise, both petitioner and the Solicitor General argue that the violation of such prophylactic rules does not justify the exclusion of otherwise reliable evidence for impeachment purposes. Cf. Harris

v. New York, 401 U.S. 222 (1971). This argument is flawed for several reasons.

First, it is simply not true that Michigan v. Jackson stands as the sole impediment to the use of respondent's post-arraignment statement in this case. Even without the benefit of the prophylactic rule announced in Michigan v. Jackson, the purported waiver of respondent's Sixth Amendment rights would have to be invalidated because it was the product of an affirmative misrepresentation by the police. Accordingly, it is unnecessary to resort to a prophylactic rule in order to conclude that respondent's waiver was neither knowing nor voluntary. See Johnson v. Zerbst, 304 U.S. 458 (1938).

Once it is acknowledged that Michigan v. Jackson is only an alternative basis for the holding below, this case becomes far

simpler and less controversial. Core violations of the Sixth Amendment, like core violations of the Fifth Amendment, have never been subject to a balancing test. See New Jersey v. Portash, 440 U.S. 450, 459 (1979). Otherwise, there would be little substance to this Court's assurance that the "Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." Maine v. Moulton, 474 U.S. at 176.

It is precisely because the Sixth Amendment affects the integrity of the trial process itself that petitioner's effort to draw an analogy with the Fourth Amendment does not work. In a Fourth Amendment context, the exclusionary rule is used to promote values that are separate and apart from the trial process. Under

those circumstances, this Court has been willing to balance the deterrent gain against the adjudicatory loss.

This Court has not adopted a cost-benefit approach when the constitutional violation relates to the integrity of the adjudicatory process itself. For example, the Fifth Amendment bar against self-incrimination cannot be breached for any purpose, even when there is reason to believe that a defendant's "compelled" testimony is entirely reliable and thus likely to enhance the factfinding process. New Jersey v. Portash, supra. Similarly, a defendant's right to trial by jury cannot be sacrificed merely because other methods of conducting a trial may be more efficient and, indeed, perhaps even more likely to discover the "truth."

At bottom, petitioner's real quarrel is not with the ruling below but with this Court's Sixth Amendment jurisprudence. That jurisprudence is both well-settled and well-grounded. In any event, it is not properly subject to reconsideration in this case given the limited question presented for review.

ARGUMENT

- I. RESPONDENT'S SIXTH AMENDMENT RIGHTS WERE VIOLATED IN THIS CASE BY THE USE OF DECEPTIVE POLICE TACTICS TO OBTAIN A POSTARRAIGNMENT STATEMENT WITHOUT THE BENEFIT OF COUNSEL

In a series of cases over the past half-century, this Court has repeatedly held that the right to counsel attaches at arraignment, which this Court has properly recognized as a critical stage of the criminal proceeding. See e.g., Michigan v. Jackson, 475 U.S. at 629; Maine v. Moulton,

474 U.S. at 170-71; United States v. Gouveia, 467 U.S. 180, 187-89 (1984); Brewer v. Williams, 430 U.S. 387, 398 (1977); Kirby v. Illinois, 406 U.S. 682, 689 (1972); Massiah v. United States, 377 U.S. at 205; Johnson v. Zerbst, 304 U.S. at 462-63; Powell v. Alabama, 287 U.S. at 57.

The rationale for this right is also well-established. The decision to proceed with arraignment indicates that

the government has committed itself to prosecute, and . . . that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

Kirby v. Illinois, 406 U.S. at 689.

Accordingly, the police may not interrogate an uncounseled defendant after arraignment unless the defendant has validly waived his right to representation.

Furthermore, the police may not trick a defendant into speaking by creating a scenario in which the defendant is led to believe that the presence of counsel is unimportant. This rule against chicanery is hardly unique to Sixth Amendment law. Properly understood, it is merely a restatement of the general principle that the waiver of constitutional rights must be knowing and voluntary. See Johnson v. Zerbst, supra. At the same time, it has special poignancy in the counsel context since one of the functions of counsel in our adversary system is to even the scales between the state and the often untutored defendant it is trying to prosecute.

Seen in this light, the facts of this case fit squarely within the line of cases holding that the police may not use an informant to elicit testimony from a

defendant who is represented by counsel and who, in many instances, would not voluntarily speak to the police without counsel being present. See Kuhlmann v. Wilson, 477 U.S. 436 (1986); Maine v. Moulton, *supra*; United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, *supra*.

Petitioner characterizes these cases as mere "informant" cases in an effort to distinguish them. (Pet.Br. at 29) In fact, they stand for a larger principle. As this Court expressed it in Maine v. Moulton, 474 U.S. at 176, any "knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is

the intentional creation of such an opportunity."^{5/}

That, of course, is precisely what occurred in this case. Once respondent expressed a desire to talk to the police, the police "knowing[ly] exploit[ed]" the opportunity that had fallen into their lap by deliberately misinforming respondent about the need to have counsel present. If anything, that deception is even worse than what occurred in the "informant" cases, where the constitutional sin was one of omission rather than commission. Likewise, this case is more troubling than Brewer v. Williams, 430 U.S. 387, where the police

^{5/} Petitioner devotes a large portion of its brief to arguing that Massiah was wrongly decided. (Pet. Br. at 21-52) However, as petitioner candidly acknowledges, this Court has reaffirmed Massiah at least three times during the past decade. See p.15, supra. Moreover, the continuing validity of Massiah is not included within the question presented for review by this Court.

encouraged a defendant to confess through use of the so-called "Christian burial" speech while the defendant was being transported, without counsel, from one city to another after his arraignment. At worst, the police in Brewer were guilty of a psychological ploy that was undoubtedly made easier by the absence of counsel. Here, the police engaged in an intentional misrepresentation that went to the very heart of respondent's Sixth Amendment rights.

It is hardly surprising, therefore, that the prosecution made no effort to use respondent's postarraignment statement during its case-in-chief. The Sixth Amendment violation could not have been clearer. The confusion in this case has largely arisen at the appellate level. In an effort to preserve its conviction, petitioner has constructed an argument, now

joined by the Solicitor General, that the police misconduct in this case did not violate respondent's core Sixth Amendment rights but only the prophylactic rule announced in Michigan v. Jackson. That contention is unpersuasive.

Jackson holds that the right to counsel can never be waived after arraignment regardless of the circumstances under which the arraignment is obtained. Put another way, the rule in Jackson would invalidate a postarraignment waiver even if the waiver could fairly be described as knowing and voluntary by every other objective criteria. That predicate does not exist here. The Sixth Amendment violation in this case is not a product of Jackson, although Jackson was surely violated as well. Rather, the crux of the Sixth Amendment violation in this case is that

respondent was misled into waiving his right to counsel by the deliberately false and manipulative statement that counsel was unnecessary. Given that deliberate misrepresentation, respondent's waiver could not possibly be sustained under conventional waiver theory, even without the benefit of Michigan v. Jackson.^{6/}

In short, it is important to understand that the Sixth Amendment itself was violated in this case, not merely a prophylactic rule created by this Court.

^{6/} See Carnley v. Cochran, 369 U.S. 506, 514 (1962) ("courts [should] indulge every reasonable presumption against waiver' of fundamental constitutional rights"); Moore v. Michigan, 355 U.S. 155, 161 (1957) ("[w]here the right to counsel is of such critical importance as to be an element of Due Process under the Fourteenth Amendment, a finding of waiver is not lightly to be made"); Johnson v. Zerbst, 304 U.S. at 468; cf. Moran v. Burbine, 475 U.S. 412, 423 n.1 (1986); Michigan v. Mosley, 423 U.S. 96, 104 n.10 (1975).

II. STATEMENTS OBTAINED IN VIOLATION
OF CORE SIXTH AMENDMENT RIGHTS
SHOULD NOT BE ADMISSIBLE FOR ANY
PURPOSE, INCLUDING IMPEACHMENT

Prophylactic rules exist to enforce constitutional guarantees. When prophylactic rules are violated, this Court has occasionally resorted to a cost-benefit approach in determining whether the prophylactic rule should be strictly construed. Constitutional rights, however, are not created by this Court and cannot be bargained away in pursuit of some other social goal. To the extent that the enforcement of those rights involves a weighing of interests, that balance was struck when the Constitution was written. Cf. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976). Accordingly, this Court has consistently distinguished between prophylactic rules and core constitutional values.

And when the constitutional values concern the trial process itself, this Court has been steadfast in its refusal to allow any use of tainted evidence.

Thus, in New Jersey v. Portash, 440 U.S. 450, this Court refused to engage in the very same balancing that petitioner advocates here. The precise issue in Portash was whether, despite the Fifth Amendment's prohibition against compulsory self-incrimination, a prosecutor could use legislatively immunized grand jury testimony for impeachment purposes in a criminal trial. This Court ruled against the use of such evidence, holding that testimony given in response to a grant of legislative immunity is "the essence of coerced testimony," 440 U.S. at 459, and therefore unavailable for any purpose.

The holding in Portash was not based solely on this Court's concern that compelled statements are inherently unreliable. Instead, this Court justified its holding on much broader grounds: "[A] defendant's compelled statements, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatever against him in a criminal trial." 440 U.S. at 459. This is because "[t]he Fifth and Fourteenth Amendments provide a privilege against compelled self-incrimination, not merely against unreliable self-incrimination." Id. (emphasis in original).

The Sixth Amendment right to counsel is equally vital and equally protected by the Constitution. Applying this Court's analysis in Portash, therefore, the Michigan Supreme Court has held that "the right

to counsel [is] of such fundamental importance that it [is] unnecessary . . . to . . . balance the violation of this right against condoning perjury [R]egardless of other considerations the right to counsel is so important that it must automatically be accorded the greatest protection." People v. Gonyea, 421 Mich. 462, 479 (1984).^{7/} Accord, Meadows v. Kuhlmann, 812 F.2d 72 (2d Cir.), cert. denied, 482 U.S. 915 (1987); United States v. Brown, 699 F.2d 585 (2d Cir. 1983); Bishop v. Rose, 701 F.2d 1150 (6th Cir. 1983); People v. Knippenberg, 66 Ill.2d 276 (1977).

Contrary to petitioner's view, this Court's decisions in Harris v. New York, 401 U.S. 222 (1971), and Oregon v. Hass,

^{7/} The decision in Gonyea was based on state constitutional grounds. It was nevertheless relied on as persuasive precedent by the court below. (Pet.App.7a)

420 U.S. 714 (1975), are entirely consistent with that approach. Both cases involved the use of statements obtained in violation of Miranda to impeach a defendant's testimony at trial. Neither case involved the violation of a substantive constitutional right. That distinction is crucial, as this Court explained in Portash:

Balancing of interests was thought to be necessary in Harris and Hass when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.

440 U.S. at 459.^{8/}

^{8/} See Michigan v. Tucker, 417 U.S. 433, 444 (1974) (Miranda warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected").

The constitutional distinction between Miranda, and the Fifth and Sixth Amendment rights it is meant to protect, has also been noted by Professor Kamisar:

Massiah [and the Sixth Amendment] make[] clear that once adversary proceedings have commenced against an individual, government efforts to elicit incriminating statements, whether done openly in the police station or "indirectly and surreptitiously," violate the individual's right to counsel. But when the government attempts to elicit incriminating statements from an individual before adversary proceedings have commenced against him, it is not necessarily violating his right to counsel. For in the absence of other factors, such as an inherently compelling interrogation environment [which the Fifth Amendment expressly forbids], an individual is not entitled to counsel whenever he is subjected to an "interrogation," but only when such interrogations take place at or after commencement of adversary proceedings [when the Sixth Amendment is triggered].

Kamisar, Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When

Does It Matter?, 67 Geo.L.J. 1, 66 (1978)
(emphasis added).

Petitioner's failure to grapple with the critical distinction between prophylactic rules and core constitutional values pervades its argument and cannot be rescued by drawing analogies with the Fourth Amendment. Amici acknowledge that evidence obtained in violation of the Fourth Amendment may be used for impeachment purposes. See Walder v. United States, 347 U.S. 62 (1954). The Fourth Amendment, however, is not designed to preserve the integrity of the trial process. Recognizing that fact, this Court has been willing to consider whether the deterrent value of the exclusionary rule justifies the loss of potentially relevant evidence in particular cases. Compare Mapp v. Ohio, 367 U.S. 643 (1961),

with United States v. Leon, 468 U.S. 897 (1984).

Here, the Sixth Amendment interest at stake -- like the Fifth Amendment interest at stake in New Jersey v. Portash -- is inextricably tied to our sense of a fair adversarial process. Nor is "truth" the only goal of that process, as the Solicitor General suggests in his brief. Fairness values are also important and were embodied by the framers in the Fifth and Sixth Amendments.

The rights guaranteed by these amendments have never been subject to the sort of balancing test that petitioner proposes. For example, no one would seriously argue that a defendant's right to trial by jury can be sacrificed merely because other methods of conducting a trial may be more efficient and, indeed, perhaps even more

likely to discover the "truth." Faced with the very same argument that petitioner now makes, the Sixth Circuit wrote: "Our concern is with a constitutional right which is at the heart of our adversary system of criminal justice." Bishop v. Rose, 701 F.2d at 1157.

It is, moreover, for precisely that reason that this Court should reject petitioner's effort to portray the rule it is seeking as a minor intrusion on the Sixth Amendment. In truth, petitioner's approach would substantially undermine the right to counsel that this Court has recognized as "essential to any fair trial of a case against a prisoner." Powell v. Alabama, 287 U.S. at 70.

In the instant case, respondent was misinformed by the police about the necessity of conferring with counsel before he

made his postarraignment statement. As a result, he was deprived of a vital constitutional right during the critical stages of the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." Maine v. Moulton, 475 U.S. at 170 (citations omitted).

The essence of the constitutional guarantee of the right to counsel is to permit a defendant to make an informed decision amongst a myriad of procedural and substantive choices. See Powell v. Alabama, 287 U.S. at 69. To admit evidence that is inherently tainted due to the lack of an informed decision by the defendant would largely defeat the constitutional guarantee embodied in the Sixth Amendment.

Recognizing the great pressure on law enforcement officers, this Court has

observed: "[I]t is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all."

Brewer v. Williams, 430 U.S. at 406.

Unfortunately, petitioner's rule would encourage exactly the sort of police misconduct that this record reveals. As this Court has asked in analogous circumstances, "[W]hat use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?" Maine v. Moulton, 474 U.S. at 171 (citation omitted). While perhaps not quite as stark, this case poses an equivalent problem.

✓

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

Respectfully submitted,

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